Federal Trade Commission
Supporting Statement for Mortgage Assistance Relief Services (Regulation O)
12 C.F.R. Part 1015
OMB Control No. 3084-0157

The Federal Trade Commission (FTC or Commission) requests clearance from the Office of Management and Budget (OMB) for its shared enforcement authority with the Consumer Financial Protection Bureau (CFPB) for the disclosure and recordkeeping requirements contained in the CFPB's Regulation O.

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Public Law 111–203, 124 Stat. 1376 (2010), transferred the Commission's rulemaking authority under the mortgage provisions in section 626 of the 2009 Omnibus Appropriations Act, as amended,[1] to the CFPB.[2] On December 16, 2011, the CFPB republished the Mortgage Assistance Relief Services ("MARS") Rule as Regulation O (12 C.F.R. 1015).[3] As a result, the Commission subsequently rescinded its MARS Rule (16 C.F.R. Part 322).[4] Nonetheless, under the Dodd-Frank Act, the FTC retains its authority to bring law enforcement actions to enforce Regulation O.[5]

(1) Necessity for Collecting the Information

Disclosure requirements

Regulation O retains the disclosure requirements of the FTC Final Rule[6] and adds no additional disclosure requirements. In commercial communications for a general audience, MARS providers are required to make the following disclosure:

> (1) "(Name of company) is not associated with the government and our service is not approved by the government or your lender"; and
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> (2) in some instances, that "[e]ven if you accept this offer and use our service, your lender may not agree to change your loan."

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[1] Public Law 111–8, section 626, 123 Stat. 524 (Mar. 11, 2009).

[2] Dodd-Frank Act, § 1061, 12 U.S.C. § 5581 (2010).

[3] 76 Fed. Reg. 78130.

[4] 77 Fed. Reg. 22200 (April 13, 2012).

[5] Dodd-Frank Act, § 1061(b)(5), 12 U.S.C. § 5581(b)(5).

[6] 75 Fed. Reg. 75092 (Dec. 1, 2010). OMB cleared the information collection requirements in the FTC Final Rule on Janauary 3, 2011 under Control Number 3084-0157. Thereafter, the FTC submitted adjusting burden estimates to OMB reflect its shared enforcement authority for this rule under the Dodd-Frank Act. This amounted to one-half of the FTC's previously established estimates for its prior rulemaking and enforcement authority of the now-rescinded MARS Rule. The FTC is seeking renewed clearance with those adjusted estimates for Regulation O, albeit with updated labor costing reflected in item 12 of this Supporting Statement and the associated Federal Register notices.

In addition, MARS providers must disclose to consumers, in any subsequent commercial communication directed to a specific consumer, the following information:

> (1) that "You may stop doing business with us at any time. You may accept or reject the offer of mortgage assistance we obtain from your lender [or servicer]. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us (insert amount or method for calculating the amount) for our services";
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> (2) that "(Name of company) is not associated with the government and our service is not approved by the government or your lender"; and
>
> (3) in some instances, that "[e]ven if you accept this offer and use our service, your lender may not agree to change your loan."

Furthermore, MARS providers are required to disclose to consumers in all communications in which the provider represents that the consumer should temporarily or permanently discontinue payments, in whole or in part, the following information:

> "If you stop paying your mortgage, you could lose your home and damage your credit rating."

Finally, after a provider has obtained an offer of mortgage assistance relief from the lender or servicer and presented the consumer with a written agreement incorporating the offer, the MARS provider must disclose the following:

> (1) "This is an offer of mortgage assistance relief service from your lender [or servicer]. You may accept or reject the offer. If you accept the offer, you will have to pay us [same amount as disclosed pursuant to § 1015.4(b)(1)] for our services"; and
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> (2) a description of all "material differences" between the terms, conditions, and limitations of the consumer's current mortgage and those associated with the offer for mortgage relief, provided in a written notice from the consumer's lender or servicer.

Regulation O also retains the FTC Final Rule's requirements on making the disclosures clear and prominent that are specific to the media used. The FTC concluded the disclosures were necessary for the following reasons:

- Non-affiliation with the government or lenders: Federal and state law enforcement officials have brought numerous law enforcement actions against MARS providers who have misrepresented their affiliation with government agencies or programs, lenders, or servicers, in connection with offering MARS. These providers have used a variety of techniques to create such misimpressions, including advertising under trade names that resemble the names of legitimate government programs. Given that the government, for-profit entities, and nonprofit entities assist financially distressed consumers with their

mortgages, and given the frequency of deceptive affiliation claims, the requirement that MARS providers disclose their nonaffiliation with the government or with consumers' lenders or servicers is reasonably related to the goal of preventing deception.

- Risk of Nonpayment of Mortgage: The FTC's rulemaking record demonstrates that MARS providers frequently encourage consumers, often through deception, to stop paying their mortgages and instead pay providers. Consumers who rely on these deceptive statements frequently suffer grave financial harm. Requiring MARS providers who encourage consumers not to pay their mortgages to disclose the risks of following this advice is necessary to prevent deception.

- Total amount a consumer must pay: The total cost of MARS is material to consumers in making well-informed decisions on whether to purchase those services. Requiring the clear and prominent disclosure of total cost information in every communication directed at a specific consumer before the consumer enters into an agreement would decrease the likelihood that MARS providers will deceive prospective customers with incomplete, inaccurate, or confusing cost information. Requiring MARS providers to disclose total cost information clearly and prominently is reasonably related to the prevention of deception.

In addition, Regulation O retains the FTC Final Rule's requirement that prohibits providers from collecting fees until the consumer has accepted the results obtained by the provider. To effectuate fully the advance fee ban, it also is necessary for the provider to inform consumers that they may withdraw from the service and may accept or reject the result delivered by the provider. This disclosure is reasonably related to preventing unfair and deceptive acts and practices by MARS providers.

- No guarantee: The FTC's rulemaking record revealed that MARS providers often misrepresent their likelihood of success in obtaining a significant loan modification for consumers. These deceptive success claims lead consumers to overestimate MARS providers' abilities to obtain substantial loan modifications or other relief. Requiring MARS providers to inform consumers that lenders might not agree to change consumers' loans, even if those consumers purchase the services that the MARS provider offers, is reasonably related to the goal of preventing deception.

- Written Notice from Lender or Servicer: Based on law enforcement experience and the rulemaking record, the FTC believes that providing the consumer with a notice from the consumer's lender or servicer describing all material differences between the consumer's current mortgage loan and the offered mortgage relief is essential to consumers' ability to evaluate whether they should accept the offer and therefore pay the MARS provider. Requiring that the lender or servicer prepare the written disclosure also better ensures that the information provided is consistent with the terms of the offer, and mitigates against

the risk that MARS providers would mislead consumers about the offer. This disclosure is reasonably related to the goal of protecting consumers from deception.

Recordkeeping requirements

Regulation O also retains the FTC Final Rule's recordkeeping requirements and adds no additional recordkeeping requirements. In some instances, these requirements pertain to records that are customarily kept in the ordinary course of business, such as copies of contracts and consumer files containing the name and address of the borrower and materially different versions of sales scripts and related promotional materials. Thus, the retention of these documents does not constitute a "collection of information," as defined by OMB's regulations that implement the PRA.[7]

In other instances, Regulation O requires providers to create and retain documents demonstrating their compliance with specific rule requirements. These include the requirement that providers document the following activities:

(1) performing MARS and retaining documentation provided to the consumer;

(2) monitoring sales presentations by recording and testing oral representations if engaged in telemarketing of services;

(3) establishing a procedure for receiving and responding to consumer complaints;

(4) ascertaining, in some instances, the number and nature of consumer complaints; and

(5) taking corrective action if sales persons fail to comply with Regulation O, including training and disciplining sales persons.

At the time it submitted the FTC Final Rule for OMB review, the FTC determined that the information obtained from the rulemaking record established the need for these recordkeeping requirements. The FTC concluded that there appeared to be widespread deception and unfair practices in the MARS industry, targeting financially vulnerable consumers. Accordingly, strong recordkeeping requirements are needed to ensure effective and efficient enforcement of Regulation O and to identify injured consumers.

[7] 5 C.F.R. § 1320.3(b)(2).

(2) Use of the Information

The required disclosures under Regulation O assist prospective purchasers of MARS to make well-informed decisions and to avoid deceptive and unfair acts and practices.

The information that must be kept under Regulation O's recordkeeping requirements is used by the Commission, or by persons authorized by the Commission, for enforcement purposes and to ensure compliance by MARS providers with Regulation O. The information is requested only on a case-by-case basis.

(3) Consideration to Use Improved Information Technology to Reduce Burden

The disclosures required by Regulation O are format-neutral and do not limit MARS providers' use of available information technology that might reduce compliance burdens. Likewise, Regulation O's recordkeeping provisions do not limit the use of available technology to maintain required records. Rather, Regulation O specifically allows providers to keep the records in any form and in the same manner, format, or place as they keep records in the ordinary course of business. Thus, Regulation O is consistent with the aims of the Government Paperwork Elimination Act, 44 U.S.C. § 3504 note.

(4) Efforts to Identify Duplication

The disclosure and recordkeeping provisions in Regulation O do not duplicate any other federal information collection requirements. The Commission is unaware of any duplicative state requirements.

(5) Efforts to Minimize Burden on Small Organizations

Regulation O attempts to minimize compliance burdens for all entities. Inasmuch as the population of affected providers likely consists largely of small entities, exemptions based on size would undermine the protective aims of Regulation O.

(6) Consequences of Conducting the Collection Less Frequently

Providing the disclosures required by Regulation O less frequently would undermine the protective aims of the rule. As a threshold matter, it is important that consumers know before they begin dealing with MARS providers that: (1) MARS providers are not associated with the government or with consumers' lenders; and (2) regardless of the service or result the MARS providers represent the consumer will receive by using their services, the lender may not agree to change the consumer's loan. Thus, it is necessary that these disclosures be made in all communications with consumers prior to consumers entering into an agreement to purchase MARS. In addition, these disclosures, along with the disclosure of total cost and the right to cancel the service at any time, are needed in each subsequent commercial communication with specific consumers to increase the chances that consumers will read and understand the required

information. Furthermore, the disclosure to the consumer regarding the risk of failing to pay his or her mortgage is necessary in all communications in which the triggering statement is made given the harm that could result from following such advice. These requirements will prevent MARS providers from disclaiming, qualifying, or contradicting disclosures in subsequent statements to consumers during telemarketing calls or e-mail communications. The Commission's enforcement experience indicates that this practice of contradictory statements by MARS providers is common.

Regulation O also is tailored to minimize the frequency of recordkeeping as much as possible. The rule requires that MARS providers maintain records relating to actual transactions with customers; they are not required to keep records when consumers do not sign contracts or do not agree to an offer. In addition, providers would only be required to retain materially different versions of advertising and related materials. Further, the FTC's record supports the conclusion that the two-year retention requirement is the minimum amount of time necessary for consumers to report violations of Regulation O and for the CFPB to complete investigations and to identify victims.

(7) Circumstances Requiring Collection Inconsistent With Guidelines

The collection of information in the Final Rule is consistent with all applicable guidelines contained in 5 C.F.R. 1320.5(d)(2).

(8) Consultation Outside the Agency

The Commission most recently sought public comment on the PRA aspects of the Rule, as required by 5 C.F.R. 1320.8(d). See 78 Fed. Reg. 52,915 (Aug. 27, 2013). No comments were received. The Commission is providing a second opportunity for public comment while seeking OMB approval to extend the existing PRA clearance for the notice provisions of the Rules.

(9) Payments and Gifts to Respondents

Not applicable.

(10) & (11) Assurances of Confidentiality/Matters of a Sensitive Nature

Not applicable. To the extent that information covered by a recordkeeping requirement is collected by the FTC for law enforcement purposes, the confidentiality provisions of Section 21 of the FTC Act, 15 U.S.C. § 57b-2, would apply. Furthermore, much of the information to be disclosed is of a routine business nature.

(12) Estimated Annual Hours and Labor Cost Burden

Estimated annual hours burden: 32,500 hours
Estimated labor cost burden: $1,866,975

The FTC's estimate of the burden for ongoing recordkeeping and disclosure requirements under Regulation O is based on the assumption that the total ongoing burden for this regulation remains the same as it was before the regulation was restated by the CFPB. Prior to the passage of the Dodd-Frank Act, the FTC's estimated recordkeeping and disclosure burdens under Regulation O to total approximately 65,000 hours. Given the changes made by the Dodd-Frank Act, one-half or roughly 32,500 hours of that burden is being allocated to both the FTC and the CFPB.

For simplicity, the FTC analysis will continue to treat covered entities as newly undergoing the previously assumed learning curve cycle, although this would effectively overstate estimated burden for unidentified covered entities that have remained in existence since OMB's most recently issued PRA clearance for the FTC Rule. Based on law enforcement experiences and information in the rulemaking record, the FTC estimates that Regulation O affects roughly 500 MARS providers.[8] This estimate and the corollary assumption stated above inform the additional estimates detailed below.

Estimated annual hours burden: 65,000 hours, pre-split

The above hours estimate is based on the following assumptions:

(1) Disclosures required incremental to Government-supplied language: 500 MARS providers x 2 hours each (1,000 hours)

(2) Initial setup: creating procedures to monitor compliance: 500 MARS providers x 25 hours each (12,500 hours)

(3) Documenting compliance, monitoring sales presentations, related training: 500 MARS providers x 100 hours each (50,000 hours)

(4) Retaining and filing records of compliance: 500 MARS providers x 3 hours each (1,500 hours)

Estimated associated labor cost: $3,733,950, pre-split

Commission staff assumes that management personnel will prepare the required

[8] 75 Fed. Reg. at 75095 (Dec. 1, 2010).

disclosures and implement and monitor compliance procedures at an hourly rate of $58.47.[9] Thus, the estimated labor cost to prepare the required disclosures is $58,470 (1,000 hours x $58.47) and to institute and document compliance procedures (tasks (2) and (3) listed above) is $3,654,375 (62,500 hours x $58.47). Additionally, FTC staff estimates that related recordkeeping will be performed by office support file clerks at an hourly rate of $14.07.[10] Thus, labor costs for recordkeeping will be $21,105 (1,500 hours x $14.07), for a total estimated labor cost (pre-split) of $3,733,950.

Accounting for half of the above totals, the FTC's share of burden hours is 32,500 hours and $1,866,975 for labor costs.

(13) Estimate of Capital or Other Non-Labor Costs

The FTC assumes that each of the estimated 500 MARS providers will make required disclosures in writing to approximately 1,000 consumers annually. Under these assumptions, non-labor costs will be limited mostly to printing and distribution costs. At an estimated $1 per disclosure, total non-labor costs would be $1,000 per provider or, cumulatively for all providers, $500,000. Associated costs would be reduced if the disclosures are made electronically. Accounting for half of this amount, the FTC's share of the non-labor cost burden is $250,000.

(14) Estimate of Cost to Federal Government

Annualized for a prospective 3-year PRA clearance, estimated fiscal year cost to enforce the Rule will be approximately $1,168,000. This estimate is based on the assumption that ten full attorney work years will be expended in that effort. Clerical and other support services are also included in this estimate.

(15) Program Changes/Adjustments

Other than updated labor rates to inform the labor cost estimates stated above, there are no changes to burden estimates previously submitted to OMB.

(16) Plans for Tabulation and Publication

Not applicable.

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[9] This estimate is based on an averaging of the mean hourly wages for sales and financial managers provided by the Bureau of Labor Statistics. OCCUPATIONAL EMPLOYMENT AND WAGES — MAY 2012, Table 1 (National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2012).

[10] *Id.* (for office clerks).

(17) Failure to Display the OMB Expiration Date

Not applicable.

(18) Exceptions to Certification

Not applicable.